Editor's note: Appealed -- aff'd, Civ.No. A88-467 (D.Alaska Mar. 30, 1990), aff'd, sub nom. Alex Bolt v. U.S., Civ.No. A87-106 (D.Alaska Mar. 30, 1990), aff'd, No. 90-35440 (9th Cir. Sept. 16, 1991), 944 F.2d 603

PTARMIGAN CO., INC.

IBLA 84-290 Decided March 17, 1986

Appeal from a decision of the Anchorage District Office, Bureau of Land Management, deeming mining claims abandoned and void for failure to timely file evidence of assessment work or notices of intent to hold. AA-35536 et al.

Affirmed in part, reversed in part.

1. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Mining Claims: Abandonment

   Failure to file affidavits of assessment work prior to December 31 as required by 43 U.S.C. § 1744(a) (1982), constitutes abandonment of the claims and they may be declared void by BLM.

2. Administrative Authority: Generally--Constitutional Law: Generally

   The Board of Land Appeals does not have authority to declare acts of Congress unconstitutional. If an enactment of Congress is in conflict with the United States Constitution, it is for the judicial branch to so declare.

3. Board of Land Appeals--Estoppel

   The Board of Land Appeals has well established rules governing consideration of estoppel issues. They are the elements of estoppel described in United States v. Georgia Pacific Co.; the rule that estoppel is an extraordinary remedy, especially as it relates to public lands; and the rule that estoppel against the Government must be based upon affirmative misconduct.

4. Laches--Mining Claims: Abandonment

   Delay by BLM in declaring mining claims void for failure to file the documents required by sec. 314(a) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744(a) (1982), does not negate the Government's right to do so because the statute is self-executing.

5. Federal Land Policy and Management Act of 1976: Recordation of Affidavit of Assessment Work or Notice of Intention to Hold Mining Claim--Millsites: Generally

An owner of a millsite must be given notice of a filing deficiency and an opportunity to make corrections before the site may be deemed void for failure to comply with the requirement of 43 U.S.C. § 1744(a) (1982).

APPEARANCES: John B. Patterson, Esq., Anchorage, Alaska, for appellant Ptarmigan Company, Inc.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Ptarmigan Company, Inc. (Ptarmigan), has appealed from a decision of the Anchorage District Office, Bureau of Land Management (BLM), dated December 13, 1983, deeming 67 mining claims and 1 millsite 1/ abandoned and declaring them void for failure to file either evidence of assessment work or notice of intent to hold prior to December 31, 1982, as required by section 314(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744(a) (1982), and 43 CFR 3833.2.

Appellant, through counsel, timely filed a notice of appeal and duly filed a statement of reasons supporting its appeal. On April 17, 1984, a motion for leave to intervene was filed on behalf of Wayne Bolt alleging that a direct ownership interest in some of the claims at issue had been acquired from Ptarmigan and that considerable funds had been spent on their development. On May 8, 1984, further action on all mining claim recordation cases, including this case, was suspended by the Board pending action by the United States Supreme Court on the appeal filed in Locke v. United States, 573 F. Supp. 472 (D. Nev. 1983). On April 1, 1985, the Supreme Court issued its decision, finding FLPMA section 314 to be within the affirmative powers of Congress and not violative of the due process of mining claimants. United States v. Locke, 105 S. Ct. 1785 (1985). Subsequently, the Board lifted its suspension of mining claim recordation cases, and by order of July 24, 1985, we granted Bolt's motion to intervene. Upon request, the time to file a statement of reasons was extended to October 30, 1985. No statement of reasons has been filed, and therefore Bolt is dismissed as a party to this appeal. 43 CFR 4.402(a).

The mining claims at issue were located by Kirk Stanley, president and majority shareholder of Ptarmigan in the 1960's and early 1970's. They were

1/ The mining claims at issue are the Quartz Creek Nos. 1-22 (AA-35539 - AA-35560); Ptarmigan West Nos. 12, 13, 18, 19, 24, and 25 (AA-35564 - AA-35569); Indian Ridge-Elizabeth No. 1 (AA-35571); Nabesna Glacier Nos. 1 and 2 (AA-36380, AA-36381); Nabesna River Nos. 1 and 2 (AA-36385, AA-36386); Elizabeth Nos. 47-49 (AA-36387 - AA-36389); Silver Creek Nos. 1-4 (AA-36392 - AA-36395), 12-14, 18-21, and 23-26 (AA-36397 - AA-36407); Caribou Nos. 109-111 (AA-36410 - AA-36412); Rambler Nos. 1-8 (AA-36413 - 36420); and the Glacier Claim Nos. 1-5 (AA-36421 - AA-36425). The millsite is the Silver Creek Mill Site (AA-35536).

initially recorded with BLM in 1979, and evidence of annual assessment work was timely filed until 1982, the year cited by BLM in its decision. According to the verified statement submitted by Stanley as part of his statement of reasons, on December 30 of that year, having been delayed by problems with icing on buildings at the Rambler mine, he left Nabesna, Alaska, around 5:30 a.m. to drive the approximately 300 miles to Anchorage to file affidavits of assessment work. Due to an unusual storm with high velocity warm winds which thawed the normally snowpacked roads, he did not arrive in Anchorage until 6 p.m. Believing the BLM office to be closed, he did not attempt to file his affidavits until the next day. Upon finding the office closed the next morning, he mailed the affidavits from Anchorage by special delivery mail. Although the record does not indicate whether the Anchorage District Office was open on Friday, December 31, the affidavits are date stamped as received by BLM January 3, 1983, apparently the first working day after the December 30 deadline.

[1] FLPMA section 314(a) requires that either a notice of intention to hold or an affidavit of assessment work be filed for lode or placer mining claims "prior to December 31 of each year." 43 U.S.C. § 1744(a) (1982). "Filed" is defined by regulation to mean "received and date stamped by the proper BLM office." 43 CFR 3833.0-5(m). Section 314(c) further provides that the failure to file the documents required by the section "shall be deemed conclusively to constitute an abandonment of the mining claim or mill or tunnel site by the owner." 43 U.S.C. § 1744(c) (1982). Thus, the affidavits submitted by Stanley were not timely filed and BLM properly deemed the mining claims at issue abandoned and declared them void. See United States v. Locke, supra.

Unfortunately, Stanley was apparently unaware of two matters which might have allowed him to have made timely filings. By Instruction Memorandum No. 83-110, dated November 19, 1982, the BLM Director instructed all state offices to remain open until at least 7 p.m. on December 30 for the purpose of receiving annual filings. The memorandum further instructed state offices to issue a news release informing the public of their extended hours at least a month in advance of December 30. Such a release was apparently belatedly issued by the Alaska State Office on December 10, and an item appeared in The Anchorage Times on December 13. Thus, the Anchorage District Office was open when Stanley arrived in Anchorage on December 30, and he could have filed his affidavits on the proper date.

The second alternative available to Stanley was provided by final rules published in the Federal Register on December 15, 1982, and effective December 30, 1982. The new rules amended the filing regulation to permit an annual filing mailed and postmarked on or before December 30 and received by BLM by January 19 to be treated as timely filed. 47 FR 56300, 56305 (Dec. 15, 1982); 43 CFR 3833.0-5(m). Previously, affidavits mailed by mining claimants were timely filed only if they were actually received by BLM on or before December 30. Under the new regulation, Ptarmigan's affidavits would have been timely filed if Stanley had simply mailed them by December 30 from a post office rather than driving to Anchorage. Appellant, however, admits that the required documents were not mailed until December 31.

The unusual circumstances in which the late filing of affidavits for the claims at issue occurred, form part of the basis of several arguments raised by appellant. Three arguments involve the equal protection and due process clauses of the United States Constitution. While appellant recognizes that this Board does not view itself as vested with authority to declare acts of Congress unconstitutional, it nevertheless raises these issues in order to preserve them for subsequent appeal and in hopes that we will find the action taken by BLM to be improper.

[2] Appellant is correct that this Board does not have authority to declare acts of Congress unconstitutional. The Department of the Interior, of which this Board is a part, is an agency of the Executive Branch of the Government whose duty it is to carry out laws enacted by Congress. If an enactment of Congress is in conflict with the United States Constitution, it is within the province of the Judicial Branch to so declare. Alex Pinkham, 52 IBLA 149 (1981); Charlie Carnal, 43 IBLA 10 (1979); Al Sherman, 38 IBLA 300 (1978). To the extent that Ptarmigan has argued that it has been deprived equal protection and due process because others availed themselves of the additional hours and new mailing regulations, we fail to find any action by BLM which deprived Ptarmigan of its rights. Although it is unfortunate that Stanley was not aware of the steps BLM had taken to make it easier for mining claimants to comply with the filing requirement, his lack of knowledge does not change or excuse the fact that the affidavits were received after the statutory deadline. We find nothing in BLM's action in deeming Ptarmigan's mining claims to be void that was either arbitrary or based on different standards than applied to other mineral locators. To the contrary, BLM's action conformed to the requirements of the statute and duly promulgated regulations.

The circumstances of appellant's late filing are also part of its additional argument that, because its affidavits were filed on the first business day after December 30, 1982, "the earliest time at which the Bureau could have or would have made any determination as to the staleness of claims under its jurisdiction" (Appellant's Brief at 28), we should find that it substantially complied with the statutory requirement. Ptarmigan bases this argument on the district court decision in Locke v. United States, supra. The conclusion of the district court was reversed, however, by the Supreme Court. The Court stated: "A filing deadline cannot be complied with, substantially or otherwise, by filing late -- even by one day." United States v. Locke, supra at 1976. Accordingly, we must reject appellant's argument on this point.

Appellant presents two additional arguments which merit greater attention. First, it argues that BLM should be estopped from declaring its claims invalid. This argument is based on numerous contacts with personnel from several agencies of the Department during the summer of 1983. There was apparently an ongoing series of consultations between appellant and National Park Service officials concerning revisions to the plan of operations for the Rambler claims to allow construction of a road. As part of the review process to amend the plan, Park Service employees conducted several inspections at the mine site. In addition, in June, BLM requested and was sent a map of the Quartz Creek claims. Appellant was also contacted by the Geological Survey to obtain approval for mapping at the Rambler mine site.

[3] This Board has well established rules governing our consideration of estoppel issues. First, we have adopted the elements of estoppel described by the Ninth Circuit Court of Appeals in United States v. Georgia Pacific Co., 421 F.2d 92 (9th Cir. 1970):

> Four elements must be present to establish the defense of estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted on or must so act that the party asserting the estoppel has a right to believe it is so intended; (3) the latter must be ignorant of the facts; and (4) he must rely on the former's conduct to his injury.

Id. at 96 (quoting Hampton v. Paramount Pictures Corp., 279 F.2d 100, 104 (9th Cir. 1960)). See State of Alaska, 46 IBLA 12, 21 (1980); Henry E. Reeves, 31 IBLA 242, 267 (1977). Second, we have adopted the rule of numerous courts that estoppel is an extraordinary remedy, especially as it relates to the public lands. Harold E. Woods, 61 IBLA 359, 361 (1982); State of Alaska, supra. Third, estoppel against the Government in matters concerning the public lands must be based upon affirmative misconduct, such as misrepresentation or concealment of material facts. United States v. Ruby Co., 588 F.2d 697, 703 (9th Cir. 1978); D. F. Colson, 63 IBLA 121 (1982); Arpee Jones, 61 IBLA 149 (1982). Finally, we have noted that while estoppel may lie where reliance on Governmental statements deprived an individual of a right which he could have acquired, estoppel does not lie where the effect of such action would be to grant an individual a right not authorized by law. See Edward L. Ellis, 42 IBLA 66 (1979).

Under these standards, estoppel does not apply in the present case. Assuming the first two requirements described in Georgia Pacific were met, appellant could not have been ignorant of the "true facts." The requirement to file "prior to December 31" is statutory and is repeated in the Department's regulations. Persons dealing with the Government are chargeable with knowledge of statutes and duly promulgated regulations. Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380 (1947). Ptarmigan knew that it had not filed its affidavits by the deadline. It could only have hoped that BLM would not notice its failure to meet the requirement or would, for some reason, treat the filings as timely. Thus, to the extent that appellant's dealings with Departmental personnel can be construed as implied representations that the claims were not void, such did not concern facts unknown to the appellant. See Tom Hurd, 80 IBLA 107 (1984); John Murphy, 58 IBLA 75, 80-81 (1981); Coronado Oil Co., 52 IBLA 308, 312 (1981). For the same reason, reliance on any representations attributable to the Department was not justified. Ptarmigan may have spent considerable funds developing its claims, but it knew that its affidavits had not been filed within the deadline. Any injury incurred must be viewed as based on a calculated risk that the defect in the filings would not bear the statutory consequence. See United States v. Georgia Pacfic Co., supra at 96 n.4.

Nor does there appear to have been any affirmative misrepresentation or concealment of facts by Departmental officials. No allegation has been made that appellant was ever told that his claims were not void or that the assessment work affidavits for 1982 were properly filed. That such implicit representation might be ascribed to the Department based on appellant's contacts

with its personnel does not constitute affirmative misconduct. See Schweiker v. Hansen, 450 U.S. 785 (1981).

[4] Appellant also argues that the almost one year which elapsed prior to BLM's decision was unreasonable delay. While delay by an agency in taking action on a matter before it can have a bearing on the propriety of administrative actions, see 5 U.S.C. §§ 555(b), 706(1) (1982); British Airways Board v. Port Authority of New York and New Jersey, 564 F.2d 1002, 1010 (2nd Cir. 1977), such considerations do not apply in the present case. Even assuming that the time it took for BLM to review its files and notify Ptarmigan that its claims were void constituted unreasonable delay, no right of appellant was in jeopardy. As noted by the Supreme Court in Locke, section 314 is self-executing. United States v. Locke, supra at 1795. See Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981). Thus, the claims became abandoned and void when the annual filings were not timely made, not upon BLM's declaration of that fact. BLM's decision was declaratory of existing facts and did not constitute the action which caused the voiding of the claims. Moreover, BLM has no affirmative obligation to inform a claimant of his claims' invalidity within any specific time frame, even though BLM attempts to do so with as much dispatch as possible. See 43 CFR 3833.5(f).

[5] Finally, appellant notes that the Silver Creek Mill Site was declared void and that this Board has held the owners of millsites must be given notice of a deficiency and an opportunity to correct it before their millsites may be deemed void for failure to comply with FLMPA's filing requirement. In this, appellant is correct. Harvey Clifton, 60 IBLA 29 (1981); Feldslite Corporation of America, 56 IBLA 78, 88 I.D. 643 (1981). See Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981). Because such notice was not given to Ptarmigan by BLM, its decision as to the Silver Creek Mill Site must be reversed.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to all mining claims and reversed as to the Silver Creek Mill Site.

James L. Burski
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Wm. Philip Horton
Chief Administrative Judge.